TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 05-541

EMPAGRAN, S.A., *et al.*,
Petitioners,

v.

F. HOFFMANN-LA ROCHE LTD, HOFFMANN-LA ROCHE INC., ROCHE VITAMINS INC., BASF AG, BASF CORP., RHONE-POULENC ANIMAL NUTRITION INC., RHONE-POULENC INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT

Petitioners advance no reason that would justify this Court's review of the court of appeals' decision. They do not claim that there is a conflict in the courts of appeals, nor do they identify any extraordinary circumstance that might justify review in the absence of such a conflict. The court of appeals' unanimous opinion faithfully followed this Court's precedents, in particular this Court's prior unanimous ruling in this case. The decision below correctly weighed considerations of comity and longstanding antitrust precedents in holding that the Sherman Act's limited extraterritorial scope does not

permit claims by foreign plaintiffs whose injuries are caused by anticompetitive conditions in foreign countries and do not directly arise from anticompetitive conditions in the United States.

Less than two years ago, this Court reviewed an earlier decision in this case to resolve a conflict in the courts of appeals as to a critically important question: whether the Sherman Act applies to price-fixing claims by foreign entities whose injuries did not arise from effects of the defendants' conduct on U.S. commerce but rather arose from effects on foreign countries. In *F. Hoffmann-La Roche Ltd v. Empagran S.A.*, 542 U.S. 155 (2004), this Court unanimously held that it did not. Pet. App. 28a. The Court determined that, under the Foreign Trade Antitrust Improvements Act of 1982 (the "FTAIA"), 15 U.S.C. § 6a, Sherman Act claims based on conduct "involving trade or commerce * * * with foreign nations" can be asserted by foreign plaintiffs only if an effect on U.S. commerce "gives rise to" the foreign plaintiffs' claims.

The Court remanded the case for consideration of petitioners' alternative argument that a U.S. effect was a "but for" cause of their foreign injuries that thereby "gave rise to" them, even though those injuries were directly caused by higher prices charged in foreign countries by foreign sellers. Petitioners argued that the alleged cartel, in order to raise prices in the foreign countries where petitioners' purchases were made, necessarily had to raise prices in the United States, because lower U.S. prices would have driven down prices abroad. Hence, petitioners argued, an effect on U.S. commerce was a contributing cause of their injuries in foreign countries. On remand, however, petitioners conceded that the FTAIA's requirement that a U.S. effect "give[] rise to" the foreign injury imposes a proximate cause standard.

Applying that standard, the D.C. Circuit unanimously determined that higher U.S. prices were not the proximate cause of petitioners' injuries, which were proximately caused by

higher prices in the foreign countries where petitioners made their purchases. That ruling is entirely consistent with this Court's *Empagran* opinion, with the text and history of the FTAIA and with considerations of international comity, and it comports with the well-established principle that U.S. antitrust law does not regulate "the competitive conditions of other nations' economies," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 (1986). It also comports with the views of the United States, the Federal Trade Commission and the governments of our major trading partners. Those foreign governments appeared below and in the earlier proceedings before this Court to defend their sovereign interests in applying their domestic competition policies, including their approved remedies, to transactions occurring in their own countries. Finally, petitioners' concession before the D.C. Circuit that the FTAIA requires that a U.S. effect proximately caused their injuries makes this case a poor vehicle for review, because petitioners allege in substance only a "but for" relationship between U.S. prices and their foreign injuries. See *Empagran*, 542 U.S. at 175 (Pet. App. 45a).

1. In the late 1990s, the Department of Justice began investigating cartel activity among bulk vitamin producers. Several manufacturers and distributors of bulk vitamins subsequently pled guilty to criminal violations of the Sherman Act and paid approximately $900 million in fines. More than 75 private federal antitrust cases, including class actions, were filed, and virtually all have settled, for well more than $2 billion. In addition, more than 20 lawsuits filed by state attorneys general and more than 100 state law private actions have been settled for more than $400 million. Outside the United States, record civil penalties exceeding $1 billion were assessed against some respondents by Australia, Canada, the European Union and Korea, and investigations are ongoing in Brazil and Mexico. Private civil suits for damages have been filed in Australia, Belgium, Canada, France, Germany, the

Netherlands, New Zealand and the United Kingdom (including eight in the past year), including class actions in Australia and Canada.

Petitioners are four foreign companies located in Australia, Ecuador, Panama and Ukraine. They allegedly purchased vitamins in their local markets from foreign sellers in transactions outside U.S. domestic or export commerce. They neither purchased vitamins in the United States nor attempted to do so. Petitioners brought suit in 2000 in federal district court asserting claims under the Sherman Act. Their complaint alleges that bulk vitamins are commodities and that respondents engaged in concerted anticompetitive behavior in the "global market" for bulk vitamins. Compl. ¶ 89. Petitioners purport to represent a worldwide class of foreign entities that purchased vitamins outside the United States, although at least one of the petitioners, Windridge Pig Farm, is also a plaintiff in a class action in Australia.

2. The district court dismissed petitioners' claims, ruling that they fell outside the subject matter jurisdiction of the Sherman Act as amended by the FTAIA. The FTAIA provides in pertinent part that the Sherman Act "shall not apply to conduct involving trade or commerce * * * with foreign nations," unless such conduct has a "direct, substantial, and reasonably foreseeable effect" on U.S. domestic trade or commerce and "such effect gives rise to a [Sherman Act] claim." 15 U.S.C. § 6a. The district court held that the FTAIA required petitioners to show that a U.S. effect of respondents' conduct "gives rise to" their own claims, not just any claim. The court also held that petitioners could not satisfy this requirement merely by alleging the existence of a transnational vitamins market. Pet. App. 94a.

The court of appeals reversed in a divided panel ruling. The majority interpreted the FTAIA to permit plaintiffs whose injuries have no connection to U.S. commerce to assert Sherman Act claims so long as the alleged misconduct affected

U.S. commerce and that U.S. effect gave rise to a claim of "someone, even if not the foreign plaintiff who is before the court." Pet. App. 50a. The panel majority believed that imposing liability under U.S. law for purely foreign injuries would enhance deterrence of transnational cartels. Pet. App. 75a–78a.

The D.C. Circuit's divided panel ruling conflicted with an earlier ruling by the Fifth Circuit, which had interpreted the "gives rise to a claim" language of the FTAIA as requiring that the U.S. effect of the defendants' conduct give rise to the Sherman Act claim of the particular plaintiff before the court. *Den Norske Stats Oljeselkap AS v. HeereMac v.o.f.*, 241 F.3d 420, 427 (5th Cir. 2001), *cert. denied sub nom. Statoil ASA v. HeereMac v.o.f.*, 534 U.S. 1127 (2002). The Second Circuit too had issued an opinion that conflicted with the Fifth Circuit's decision. *Kruman v. Christie's Int'l PLC*, 284 F.3d 384 (2d Cir. 2002).

3. This Court granted certiorari to resolve the split among the courts of appeals. In a unanimous decision, it vacated the D.C. Circuit panel's decision, holding that the FTAIA requires plaintiffs to demonstrate that their own injuries arose from an effect on U.S. commerce. Two principles, this Court explained, dictated this conclusion.

First, the Court noted that Congress considers the legitimate sovereign interests of other nations when writing U.S. law, and that U.S. antitrust laws should accordingly be construed, absent a clear statement to the contrary, so as to avoid undue interference with others nations' sovereign prerogative to regulate their own economies. *Empagran*, 542 U.S. at 164 (Pet. App. 34a). The Court concluded that applying U.S. antitrust law to foreign conduct would be unreasonable when the plaintiffs' injuries were not caused by the effect of such conduct on U.S. commerce. *Id.* at 165 (Pet. App. 35a). These comity considerations also dictated that the FTAIA's jurisdictional test should be categorical and readily administrable,

because a fact-intensive inquiry into whether U.S. law conflicts with foreign policy in a particular case would "mean[] lengthier proceedings, appeals, and more proceedings—to the point where procedural costs and delays could themselves threaten interference with a foreign nation's ability to maintain the integrity of its own antitrust enforcement system." *Id.* at 168–69 (Pet. App. 39a).

Second, the Court noted that the FTAIA's purpose had been "to clarify, perhaps to limit, but not *to expand* in any significant way, the Sherman Act's scope as applied to foreign commerce," *id.* at 169 (Pet. App. 39a) (emphasis in original), and that when the FTAIA was enacted, there was no meaningful precedent to suggest to Congress that the Sherman Act provides redress for injuries caused by effects on foreign rather than U.S. commerce, *id.* at 169–70 (Pet. App. 40a). Accordingly, the Court concluded that the statute should not be construed to provide recovery for injuries that arose from effects on foreign rather than U.S. commerce. *Id.* at 173 (Pet. App. 43a).

Having rejected the court of appeals' expansive construction of the FTAIA, the Court remanded the case for consideration of an alternative argument made by petitioners. Petitioners had also argued that their injuries did arise from an effect on U.S. commerce, because that effect, they asserted, was essential to maintaining inflated prices in the foreign countries where they purchased vitamins. Rather than reach this question in the first instance, the Court directed the D.C. Circuit to decide on remand whether "this 'but for' condition," *id.* at 175 (Pet. App. 45a), could satisfy the FTAIA's requirement that a U.S. effect "give[] rise to" the plaintiff's injury.

4. On remand, after full briefing and argument, the court of appeals unanimously determined that petitioners' injuries did not arise from an effect on U.S. commerce, because the "mere but-for" causal connection to U.S. commerce petitioners alleged was "simply not sufficient" to satisfy the statute.

Pet. App. 7a. The court determined that the FTAIA's requirement that a U.S. effect "give[] rise to" the plaintiff's injury restricts application of the Sherman Act to cases where a U.S. effect is the proximate cause of the plaintiff's injury, a proposition that the court noted petitioners had expressly conceded at argument. *Id.*[1] Against this standard, the court held that even if respondents had raised U.S. prices in order to keep prices high in the foreign countries where petitioners purchased vitamins, that mere "but-for" relationship between the U.S. effect (higher U.S. prices) and petitioners' injuries (payment of higher prices abroad) was too attenuated to satisfy the FTAIA. Pet. App. 7a.

The court of appeals closely followed the reasoning of this Court's *Empagran* opinion. The panel expressly recognized that ambiguous statutes should be construed "to avoid unreasonable interference with the sovereign authority of other nations." Pet. App. 7a (quoting *Empagran*, 542 U.S. at 164 (Pet. App. 34a)). With this touchstone, the court concluded that any standard short of a proximate cause relationship between the U.S. effect and the foreign injury "would open the door to just such interference with other nations' prerogative to safeguard their own citizens from anticompetitive activity within their own borders." Pet. App. 7a.

The court agreed with the United States that the few precedents for applying the Sherman Act to foreign injuries were distinguishable. It noted that in *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308 (1978), this Court had not examined the causal relationship between the U.S. effect and the plaintiff's injury (Pet. App. 5a), and that in the others, an effect on U.S. commerce was plainly the direct cause of the plaintiff's injury. Pet. App. 5a–6a (discussing *Industria Siciliana Asfalti, Bitumi, S.p.A. v. Exxon Research & Eng'g Co.*, No. 75 Civ.

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[1] "As [petitioners] acknowledged at oral argument • • • 'but-for' causation between the domestic effects and the foreign injury claim is simply not sufficient." Pet. App. 6a.

5828-CSH, 1977-1 Trade Cas. (CCH) ¶61,256, 1977 WL 1353 (S.D.N.Y. Jan. 18, 1977), and *Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080 (D.C. Cir. 1998)). Petitioners, by contrast, had failed to show "the kind of direct tie to U.S. commerce found in the cited cases." Pet. App. 7a. Their allegations stated "only an indirect connection between the U.S. prices and the prices they paid when they purchased vitamins abroad." Pet. App. 8a. The direct cause, the court explained, was foreign prices: "[I]t was the foreign effects of price-fixing outside the United States that directly caused, or 'gave rise to,' their losses when [petitioners] purchased vitamins abroad at super-competitive prices." *Id.* The "mere but-for" connection petitioners alleged between the U.S. prices and the prices paid in foreign countries was, the court concluded, insufficient to satisfy the FTAIA. Pet. App. 7a.

5. The United States, the Federal Trade Commission and the various foreign governments that have participated in this case since it was previously before this Court all supported this conclusion. The Department of Justice argued that permitting petitioners to recover under U.S. law would impair antitrust enforcement efforts, because the threat of worldwide liability under U.S. law would discourage violators from disclosing misconduct under the Department's corporate leniency program. See, *e.g.*, Brief for the United States and the Federal Trade Commission ("U.S. Br.") at 20 ("Plaintiffs' theory threatens to upset the balance of incentives and disincentives that drives the amnesty program. * * * [T]he massive increase in potential civil liability [proposed by plaintiffs] would radically tilt the scale of incentives for conspirators against seeking amnesty."). The Department also warned of friction with foreign countries if the Sherman Act were applied to claims by persons whose injuries arose from the effects of anticompetitive conduct on foreign countries. See, *e.g.*, *id.* at 5 ("Opening U.S. courts to antitrust class actions from around the world also would interfere with the sovereign decisions of other nations about the appropriate remedies

to offer their consumers, their ability to regulate their commercial affairs, and their antitrust amnesty programs.").

For their part, the Governments of Canada, Germany, Japan, the Netherlands, Switzerland and the United Kingdom all defended their sovereign prerogative to regulate commercial affairs within their own countries and, in particular, to decide for themselves how injuries caused by the effects of anticompetitive conduct on their economies may be remedied.[2]

REASONS FOR DENYING THE PETITION

There is no reason for this Court to review the decision below. Less than two years ago, in a prior ruling in this case, the Court resolved a critically important conflict in the courts of appeals, holding that a foreign plaintiff cannot sue under the Sherman Act for injuries that do not arise from the U.S. effect of the defendants' conduct. Petitioners now seek review of the court of appeals' case-specific determination on remand that the injuries they allege did not arise from any U.S. effect. There is no conflict in the courts of appeals as to either that result or the reasoning behind it. Nor is there any tension between the decision below and this Court's precedents. To the contrary, the D.C. Circuit faithfully followed the reasoning of this Court's opinion in *Empagran*, and the result below is supported by principles of comity and longstanding antitrust precedent. There is, in short, no "unfinished business" for this Court to complete. The D.C. Circuit's ruling is consistent, moreover, with the views of the United States and the Federal Trade Commission and of every foreign nation that has participated in these proceedings, as well as the great weight of academic authority. Indeed, as the leading antitrust treatise has recognized, acceptance of petitioners' arguments would "undermine the en-

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[2] Respondents have requested permission to lodge with the Clerk of the Court, for the Court's convenience, copies of the briefs submitted below by the United States and the Federal Trade Commission and by foreign governments.

tirety of the Court's opinion [in *Empagran*], which unambiguously held that foreign plaintiffs injured by a conspiracy that also injured American purchasers could not sue under the Sherman Act." 1A P. AREEDA & H. HOVENKAMP, ANTITRUST LAW ¶ 273a (2d ed. spec. supp. 2005).[3]

Finally, even if there were a significant question here, this case is not a proper vehicle to address it, as a result of petitioners' concession below that the FTAIA cannot be satisfied when U.S. effects are merely the "but for" cause of foreign injuries. See *supra* p. 7 & n.1. As this Court recognized when it remanded this case, 542 U.S. at 175 (Pet. App. 45a), the essence of petitioners' argument is that the "but for" relationship they allege between U.S. prices and their foreign

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[3] This Court's review of rulings after remand in other cases (cf. Pet. 9 n.2) does not support granting the petition in this case; indeed, the Court frequently declines to review such rulings. See, *e.g.*, *Fellers v. United States*, 74 U.S.L.W. 3228 (U.S. Oct. 11, 2005) (denying petition for review of ruling after remand); *Chavez v. Martinez*, 542 U.S. 953 (2004) (same); *Fitzgerald v. Racing Ass'n of Cent. Iowa*, 541 U.S. 1086 (2004) (same). None of the cases cited by petitioners suggests that the petition should be granted here. In *Johnson v. California*, 125 S. Ct. 2410 (2005), the Court granted review after a jurisdictional defect that had initially required dismissal had been cured. In *Scheidler v. NOW, Inc.*, 537 U.S. 393, 399–400 (2003), the Court granted certiorari a second time on unrelated issues independently worthy of review after extensive proceedings in the lower courts, including a seven-week trial; the Court granted certiorari a third time to address profound confusion by the court of appeals as to whether plaintiffs' claims survived the Court's prior decision, see *Operation Rescue v. NOW, Inc.*, 125 S. Ct. 2991 (2005). In the other cases cited by petitioners, the court of appeals plainly disregarded an earlier decision of this Court. See *Miller-El v. Dretke*, 125 S. Ct. 2317, 2335 (2005) (observing that the court of appeals' opinion on remand rested on an argument "first advanced in dissent when the case was last here"); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) (reversing ruling that disregarded this Court's prior opinion in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997)). None of these cases suggests that the standard for granting review after remand is different than in other cases or supports granting the petition here.

injuries satisfies the FTAIA. Indeed, the Court remanded the case for the D.C. Circuit to consider precisely that argument. Petitioners' litigation choice to abandon that argument below precludes them from making it now (and thus they strain to portray their injuries as the proximate result of higher U.S. prices). Yet the real issue presented here remains whether the "but for" relationship petitioners allege satisfies the FTAIA, a question foreclosed by petitioners' concession below. Accordingly, even if review of that question were warranted (and it is not), this case provides no occasion to reach it.

I. THERE IS NO CONFLICT IN THE COURTS OF APPEALS.

The decision below does not conflict with any decision of any other court of appeals. Only one other court of appeals has addressed the question decided below, and that court determined, like the D.C. Circuit, that the Sherman Act does not permit recovery for foreign injuries unless they were proximately caused by anticompetitive conditions in the United States. Both courts of appeals deemed insufficient foreign plaintiffs' allegations of an international market, a transnational cartel and "interdependence" between the cartel's U.S. effects and the foreign effects that caused the plaintiffs' foreign injuries. No court of appeals has reached a contrary conclusion. The courts of appeals are thus unanimous in the view that the FTAIA cannot be satisfied by allegations that the effect of price-fixing on U.S. commerce was a "but for" cause of foreign injuries. This consensus belies any need for review of the decision below.

In an opinion issued before this Court's ruling in *Empagran*, the Fifth Circuit rejected essentially the same arguments that petitioners make here. *Den Norske Stats Oljeselskap AS v. HeereMac v.o.f.*, 241 F.3d 420 (5th Cir. 2001), *cert. denied sub nom. Statoil ASA v. HeereMac v.o.f.*, 534 U.S. 1127 (2002). The plaintiff in *Den Norske* was a Norwegian oil company that had purchased heavy-lift barge services in the

North Sea. It alleged that the barge-service providers had engaged in a global conspiracy to fix bids and allocate customers and territories. Like petitioners here, the *Den Norske* plaintiff argued that the cartel's effect on U.S. commerce was a contributing cause of its foreign injury. It alleged that "the market for heavy-lift services in the world is a single, unified, global market" and that, "because the United States is a part of this worldwide market, the effect of the conspiracy, whether in the United States or in the North Sea, 'gives rise' to any claim that is based upon this conspiracy." *Id.* at 425.

The Fifth Circuit rejected that argument. It was not enough, it concluded, that the plaintiff had alleged "a connection and an interrelatedness between the high prices paid for services in the Gulf of Mexico and the high prices paid in the North Sea." *Id.* at 427. The court determined that the FTAIA's "gives rise to" language "requires more than a 'close relationship' between the domestic injury and the plaintiff's claim," *id.*, and that the alleged "but for" causal connection was not sufficient. The court noted, moreover, that "[a]ny reading of the FTAIA authorizing jurisdiction over [the plaintiff's] claims would open United States courts to global claims on a scale never intended by Congress." *Id.* at 431.

The Fifth Circuit's reasoning and conclusions are entirely consistent with the D.C. Circuit's, and no other circuit court has reached a contrary result. The only other circuit court to face the question whether a "but for" causal relationship between a U.S. effect and a foreign injury can satisfy the FTAIA disposed of the case without deciding it. See *Sniado v. Bank Austria AG*, 378 F.3d 210, 212–13 (2d Cir. 2004) (holding that jurisdiction was lacking over plaintiff's claim because his assertion that his foreign injury was "not independent" of the conspiracy's effect on U.S. commerce was "too conclusory to avert dismissal"). There is, in short, no confusion or difficulty suggesting that guidance by this Court is needed. To the contrary, like the courts of appeals, the district courts are unanimous in their rejection of argu-

ments that the FTAIA can be satisfied by "worldwide market" allegations that posit a "but for" relationship between U.S. prices and prices charged in foreign countries. This consistency throughout the federal courts demonstrates that review is unnecessary and unwarranted.[4]

II. THE COURT OF APPEALS FOLLOWED THIS COURT'S PRIOR DECISION IN THIS CASE AND CORRECTLY HELD THAT THE SHERMAN ACT DOES NOT APPLY TO PETITIONERS' CLAIMS.

The court of appeals faithfully followed this Court's prior *Empagran* ruling, which sets forth the considerations courts are to weigh in interpreting and applying the FTAIA. As this

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[4] Every district court that has addressed the issue has determined that allegations of "worldwide markets" or "international" cartels are inadequate to show that a U.S. effect gave rise to a plaintiff's foreign injury. See *In re Monosodium Glutamate Antitrust Litig.*, No. 00-MDL-1328 (PAM), 2005 WL 2810682, at *1 (D. Minn. Oct. 26, 2005) (dismissing antitrust claims by purchasers of MSG and nucleotides outside the United States despite allegations "that MSG and nucleotides are fungible and globally marketed," and that defendants could "sustain super-competitive prices abroad only by maintaining super-competitive prices in the United States"); *id.* at *3 ("The global price-fixing cartel theory establishes only an indirect relationship between United States prices and the prices paid in foreign markets. As such, Plaintiffs can only show that the foreign effect of price-fixing gave rise to their injuries."); *Latino Quimica-Amtex S.A. v. Akzo Nobel Chems. B.V.*, No. 03 Civ. 10312 (HB)(DF), 2005 U.S. Dist. LEXIS 19788, at *32 (S.D.N.Y. Sept. 7, 2005) (holding that allegations of "an interchangeable commodity" and a "worldwide geographic market where price movements in one geographic sub-market would have a ripple-effect on prices in other geographic sub-markets" are inadequate to show that foreign injuries arose from a U.S. effect); *eMag Solutions, LLC v. Toda Kogyo Corp.*, No. C 02-1611 PJH, 2005 WL 1712084, at *8 (N.D. Cal. July 20, 2005) (to same effect); cf. *MM Global Servs., Inc. v. Dow Chem. Co.*, 329 F. Supp. 2d 337, 339 (D. Conn. 2004) (declining to dismiss antitrust claims because the plaintiffs allegedly "purchased * * * products *in the United States*") (emphasis added).

Court had done in *Empagran*, the court of appeals construed the FTAIA in light of international comity concerns and the statute's purpose, as described by this Court, "to clarify, perhaps to limit, but certainly not *to expand*" the extraterritorial reach of U.S. antitrust law. 542 U.S. at 169 (Pet. App. 39a). The court of appeals' decision is entirely consistent with this Court's *Empagran* decision, with considerations of international comity and with the text and purpose of the FTAIA. Not surprisingly, it also is consistent with the views of the United States, the Federal Trade Commission and the various foreign nations that submitted briefs both previously in this Court and in the court of appeals, all of which urged the result reached below. Against this united front, petitioners advance policy arguments that have no basis in the statute's text and are contrary to the unanimous views of every governmental authority that has spoken.

A. The Comity Considerations Cited by This Court in Its Prior Decision Fully Support the Decision Below.

The considerations of international comity on which this Court relied in *Empagran* fully support the court of appeals' construction of the FTAIA. This Court noted in *Empagran* that even foreign countries that agree with the United States' prohibition of price-fixing may "disagree dramatically about appropriate remedies" for violations and, further, that the extension of U.S. antitrust remedies to anticompetitive conduct abroad "has generated considerable controversy." 542 U.S. at 167 (Pet. App. 37a). Indeed, in both the prior proceedings in this Court and in the circuit court below, several foreign nations, including the leading trading partners of the United States, have urged that the Sherman Act not be applied to petitioners' claims, and that those claims should instead be governed by the competition policies, including the remedies, adopted by the countries where petitioners reside or purchased vitamins. In the long history of this case, no

government has supported petitioners or any of the various arguments they have advanced.

In *Empagran*, this Court reaffirmed the interpretive principle that ambiguous statutes should ordinarily be construed "to avoid unreasonable interference with the sovereign authority of other nations." *Id.* at 164 (Pet. App. 34a). This principle derives from the concept of "prescriptive comity," which dictates that nations may reasonably regulate conduct outside their borders to prevent or remedy adverse domestic effects but cannot reasonably regulate foreign conduct absent such a purpose. *Id.* at 164–65 (Pet. App. 34a–36a). In keeping with these principles, the extraterritorial application of U.S. antitrust law has always been justified by the need "to redress *domestic* antitrust injury" caused by anticompetitive conduct outside the United States. *Id.* at 165 (Pet. App. 35a) (emphasis in original). Weighing these considerations, this Court concluded in *Empagran* that U.S. antitrust laws could not reasonably regulate conduct outside the United States that caused foreign injuries unrelated to any effect of anticompetitive conduct on the United States. Regulation of conduct that injures persons in foreign countries by affecting foreign economies is, this Court concluded, properly the province of foreign law. "Why should American law," the Court asked, "supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British of Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?" *Id.* (Pet. App. 35a).

Petitioners' alternative jurisdictional theory fails to answer that question, as the court of appeals correctly concluded. Applying U.S. antitrust law to petitioners' foreign transactions would unreasonably interfere with the prerogative of foreign sovereigns to regulate foreign conduct, because it would not "redress *domestic* antitrust injury." *Id.* (Pet. App. 35a) (emphasis in original). Petitioners' foreign injuries were proximately caused by anticompetitive conditions in foreign

countries. Petitioners argue that the cartel needed to raise U.S. prices to maintain higher prices abroad, but it was the alleged effect of price fixing on Australia, Ecuador, Panama and Ukraine, not on the United States, that directly and primarily caused the injuries petitioners sustained in those countries. Petitioners are not U.S. persons; they did not purchase or even seek to purchase from a U.S. person; and their purchases did not take place in U.S. domestic, export or import commerce. Petitioners' foreign injuries are principally, perhaps even exclusively, a matter of concern for the foreign nations where petitioners reside or where they purchased vitamins from foreign sellers. They are not of sufficient concern to the United States to justify the extraterritorial application of U.S. law to that foreign conduct. See *id.* (Pet. App. 35a).

Having conceded below that the FTAIA requires that a U.S. effect proximately caused their foreign injuries, petitioners strain to assert that fixed prices in the United States proximately caused them to pay higher prices in foreign countries. Pet. 14–17. But their allegations do not support this claim. The relationship they allege is one of "but for" causation, as this Court recognized in remanding the case to the D.C. Circuit. 542 U.S. at 175 (Pet. App. 45a) (describing petitioners' complaint as alleging that the U.S. effect was a "'but for' condition"). Foreign market effects, not any U.S. effect, were the proximate causes of petitioners' injuries, and accordingly foreign law, not U.S. law, should regulate the foreign transactions in which they participated.

Petitioners' various efforts to portray their injuries as the proximate result of the cartel's U.S. effects all fail. Petitioners argue that they were directly injured by the cartel, quoting at length from the circuit court's vacated initial opinion. Pet. 13. But allegations that the *cartel* proximately caused their injuries is irrelevant to the jurisdictional test under the FTAIA; the statute requires petitioners to show that the cartel's *effect* on the United States caused their injuries. That is the holding of *Empagran*. Petitioners cannot collapse the distinction that

the statute draws between conduct and the effect of that conduct on the United States. It is the latter, not the former, that must "give[] rise to" injury under the FTAIA.

Indeed, in related contexts, this Court has rejected the sort of chain-of-effects theory of causation that allegedly connects petitioners' foreign injury to a U.S. cause. In *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), the Court explained that the antitrust laws do not "provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Id.* at 534 (quoting *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 263 n.14 (1972)); see also *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 266–70 (1992) (rejecting a "but for" causation standard in RICO context based on antitrust precedent). Petitioners' argument that the cartel's effect on the United States made it possible to maintain the effect on foreign countries that proximately caused their injuries describes precisely the sort of attenuated chain of causation found insufficient in these cases. Petitioners' attempt to recast this "but for" condition as proximate cause would effectively nullify the fundamental jurisdictional limitations of the FTAIA.

Nor does petitioners' allegation that the cartel raised U.S. prices with the intention of injuring petitioners in foreign countries (Pet. 14–17) transform this "but for" condition into a proximate cause. This argument simply paraphrases petitioners' basic allegation that, because there is a "worldwide market" for vitamins, respondents needed to raise prices in the United States in order to raise them abroad. Even if prices had been fixed in the United States to enable foreign injuries, the U.S. pricing was still merely a "but for" cause of those injuries. As this Court has previously held, an action intended to lead to a particular result is not necessarily the proximate cause of that result. See, *e.g.*, *Associated General*, 459 U.S. at 537 ("The availability of the [Clayton Act] § 4 remedy to some person who claims its benefit is not a ques-

tion of the specific intent of the conspirators.") (quoting *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 479 (1982)).[5]

Beyond this, petitioners' proposal to condition the applicability of the Sherman Act on whether products are economically fungible across particular geographic regions (Pet. 15–16), or whether in a particular case a cartel's subjective intent in raising U.S. prices was to maintain higher prices abroad (Pet. 17), is contrary to *Empagran*'s admonition that the FTAIA's jurisdictional rule be applied "simply and expeditiously." 542 U.S. at 169 (Pet. App. 39a). Determining in every case whether injuries to foreign purchasers were "dependent" on U.S. effects, or were an intended consequence of them, would require courts to grapple with the "enormous complexities of market definition," *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 430–31 (1990), as a threshold jurisdictional inquiry. In this case, for example, a court considering petitioners' worldwide market theory would have to evaluate cross-elasticities of demand for different vitamin products over ten years, in different countries, each having its own economic features, simply to assess the allegation that higher U.S. prices were essential to maintaining higher prices in each of the foreign countries in which petitioners purchased vitamins. As this Court noted in

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[5] See also *Green Leaf Nursery v. E.I. DuPont de Nemours & Co.*, 341 F.3d 1292, 1307 (11th Cir. 2003) ("This is too remote to satisfy the proximate cause requirements because the directness inquiry is not a question of specific intent."), *cert denied*, 541 U.S. 1037 (2004); *SEIU Health & Welfare Fund v. Philip Morris Inc.*, 249 F.3d 1068, 1074 (D.C. Cir.) ("[T]he circuits have rejected the contention that specific intent is sufficient to demonstrate proximate cause."), *cert. denied sub nom. Guatemala v. Tobacco Inst., Inc.*, 534 U.S. 994 (2001); *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 242 (2d Cir. 1999) (noting that "an allegation of specific intent does not overcome the requirement that there must be a direct injury to maintain this action," and that the contrary view has been "specifically rejected" by this Court), *cert. denied*, 528 U.S. 1080 (2000).

Empagran, the "procedural costs and delays" of such fact-intensive, case-by-case inquiries can "themselves threaten interference with a foreign nation's ability to maintain the integrity of its own antitrust enforcement system." 542 U.S. at 168–69 (Pet. App. 39a). Petitioners' proposal to make jurisdictional determinations turn on case-by-case assessments of the markets for particular products or the violators' subjective intent is simply "too complex to prove workable." *Id.* at 168 (Pet. App. 38a).[6]

In sum, petitioners' argument ignores the sovereign interests of our trading partners and would turn U.S. courts into world courts for competition claims. To apply U.S. law, including U.S. treble-damages remedies, to transactions between foreign buyers and foreign sellers in foreign countries with different antitrust policies, including different liability and damages rules, would be inconsistent with principles of prescriptive comity and would unreasonably threaten the "harmony particularly needed in today's highly interdependent commercial world." *Id.* at 164–65 (Pet. App. 35a).

B. Antitrust Precedent Further Supports the Court of Appeals' Determination That Only Foreign Injuries Proximately Caused by a U.S. Effect Are Actionable.

This Court explained in *Empagran* that Congress enacted the FTAIA in 1982 to "clarify, perhaps to limit, but certainly not *to expand*" the extraterritorial reach of the antitrust laws. 542 U.S. at 169 (Pet. App. 39a). Given this purpose, the Court concluded that the absence of any "significant author-

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[6] Petitioners' argument that their "worldwide market" theory is necessarily limited to cases involving the cartelization of commodities (Pet. 23) is refuted by *Den Norske*, where the plaintiff alleged a "single, unified, global market" for "heavy-lift barge services." 241 F.3d at 425. Petitioners' "but for" causation argument cannot be limited to any class of cases; it is the exception that would swallow the rule.

ity" in 1982 for applying the Sherman Act to claims based on injuries unrelated to any U.S. effect weighed heavily against interpreting the FTAIA to permit application of the Sherman Act to such claims. *Id.* at 173 (Pet. App. 43a). This lack of precedent for petitioners' claims further supports the decision below and is further reason to deny the petition.

The D.C. Circuit examined three cases suggesting circumstances when a U.S. effect might "give rise to" a foreign injury. See *supra* pp. 7–8. None of those cases relied on a "worldwide market" theory or "but for" chain of causation to link foreign injury to a U.S. effect; rather, in each case, the plaintiff's injury arose directly from the U.S. effects of a restraint of U.S. commerce. Pet App. 5a–6a. The circuit court correctly concluded, as had the United States, that none of these cases supports the application of the Sherman Act here. Indeed, petitioners cite only one of these cases as support for their petition, this Court's decision in *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308 (1978). Pet. 12, 18–19. But *Pfizer* in no way supports petitioners' claims.

Pfizer decided the question whether a foreign state is a "person" entitled to sue under the Clayton Act. 434 U.S. at 312. It answered that question, as the court of appeals correctly noted below, "without addressing the requisite causal relationship between domestic effect and foreign injury." Pet. App. 5a. While the *Pfizer* Court explained that its ruling would advance deterrence, it never suggested that U.S. antitrust law provides a remedy for injuries resulting from the effects of anticompetitive conduct on foreign economies. To the contrary, the Court explained its ruling in part on the ground that U.S. antitrust law should protect a foreign person that "enters *our commercial markets*," 434 U.S. at 318 (emphasis added), as apparently was the case in *Pfizer*.[7] That

[7] As Judge Higgenbotham noted in his dissent from the Fifth Circuit's decision in *Den Norske*, "[u]nlike in this case, in *Pfizer* the sales were made in the United States." 241 F.3d at 434–35.

statement fully supports the court of appeals' conclusion that a U.S. effect must be the proximate cause of the plaintiff's harm. And it fully supports the conclusion that petitioners—who did not enter our markets, did not participate in U.S. domestic or export commerce and did not even attempt to do so—were not proximately injured by any effect on U.S. commerce.

In each of the other two cases that the court of appeals identified as applying the Sherman Act to foreign injury, the foreign plaintiff was a participant (or prospective participant) in U.S. commerce and was proximately injured by the effects of anticompetitive conduct on U.S. commerce. In *Industria Siciliana Asfalti, Bitumi, S.p.A. v. Exxon Research & Engineering Co.*, No. 75 Civ. 5828-CSH, 1977-1 Trade Cas. (CCH) ¶ 61,256, 1977 WL 1353 (S.D.N.Y. Jan. 18, 1977), the plaintiff was an Italian purchaser of services exported from the United States, and its injuries arose directly from anticompetitive conduct that limited competition among U.S. exporters. Petitioners, by contrast, have not alleged that they purchased or even attempted to purchase vitamins from the United States.[8] In *Caribbean Broadcasting System, Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080 (D.C. Cir. 1998), a post-FTAIA case, the plaintiff was a British Virgin Islands

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[8] The plaintiff in *Industria Siciliana* complained that Exxon had conditioned an important oil refining contract on acceptance of another Exxon subsidiary's bid for refinery design services, which was higher than the competing bid of another U.S. company. The allegations showed that Exxon had used its market power as a crude oil supplier to "restrai[n] competition in the United States refinery design and engineering market," *id.* at *3, and that the plaintiff "was injured in its business by reason of an alleged restraint of our domestic trade" involving "the export of services," *id.* at *12. Notably, the legislative history of the FTAIA refers critically to *Industria Siciliana* as one of several lower court cases that reached too far in permitting claims by purchasers of U.S. exports. H.R. Rep. No. 97-686, at 5 (1982). The FTAIA provides particular rules, not implicated here, regarding conduct that affects U.S. export commerce. 15 U.S.C. § 6a.

company that sold radio advertising in the Eastern Caribbean to U.S. purchasers, and its injuries arose directly from anti-competitive conduct by a competitor that interfered with those sales. Petitioners, by contrast, were not excluded from transactions with U.S. market participants, and thus their claims are entirely dissimilar.

There is no precedent for petitioners' novel jurisdictional theory. No decision accepts their "worldwide market" theory of jurisdiction; nor is there any support in the case law for applying the Sherman Act to claims where a foreign injury was an indirect, albeit "intended," result of a restraint of U.S. commerce. The one case they do cite, *Pfizer*, does not support their position, given the narrow ruling in that case. Petitioners accordingly have failed to identify the "significant authority" that this Court said in *Empagran* would be required to conclude that their claims satisfy the FTAIA. 542 U.S. at 173 (Pet. App. 43a). To the contrary, the case law supports the court of appeals' determinations that the FTAIA's "gives rise to" standard requires a showing that a U.S. effect proximately caused a foreign injury, and that petitioners' allegations show, at most, a "but for" causal relationship that fails to meet the FTAIA's proximate cause test.

C. Petitioners' Policy Arguments Are Contrary to the Views of the United States and Every Foreign Government That Has Participated in These Proceedings.

Much of the petition is devoted to a policy argument, based almost entirely on allegations outside the record, that applying the Sherman Act to claims by petitioners and others in analogous circumstances will deter global cartel behavior or vindicate important economic interests. Pet. 18–24. These policy claims, which petitioners also made unsuccessfully in *Empagran*, are refuted by the United States, the Federal Trade Commission and the foreign governments that submitted briefs in the prior proceedings in this Court and in the

court of appeals. They provide no basis for review of the decision below.

The United States and the various foreign governments that have participated in these proceedings as *amici* in support of respondents (despite, in some cases, having prosecuted some of them) have unanimously disputed petitioners' argument that applying the Sherman Act to their claims is essential to deter global cartels. Indeed, they explain that petitioners' proposed construction of the FTAIA would discourage cooperation by violators and thus ultimately make it harder for antitrust enforcement authorities to detect illegal activity.

The Department of Justice and the Federal Trade Commission have stressed that the Corporate Leniency Program, which permits a cartel member to avoid criminal prosecution by being the first to cooperate with an investigation of the cartel, is one of the strongest tools in the fight against illegal anticompetitive conduct. U.S. Br. at 19. Cooperation secured through the program has been an important factor in investigations of anticompetitive conduct, including the price-fixing of vitamins that underlies petitioners' complaint. *Id.* at 1, 20.

According to the United States, increased liability under the Sherman Act for worldwide injuries would seriously impair the effectiveness of such programs by raising the costs of cooperation for potential cooperating witnesses, who remain exposed to civil claims. As *amici* noted below, "[i]n the government's experience, potential amnesty applicants weigh their civil liability exposure when deciding whether to come forward and seek amnesty." *Id.* at 20. "If consumers from around the world suddenly could bring class action suits in U.S. courts against international cartels * * * the massive increase in potential civil liability would radically tilt the scale of incentives for conspirators against seeking amnesty." *Id.* Without these informers, more illegal activity will go un-

detected, harming consumers in the United States and worldwide.

Petitioners' premise that they "are the only available enforcers of antitrust laws in the circumstances of this case" (Pet. 19) is simply untrue. Numerous foreign governmental authorities have prosecuted the vitamins cartel in foreign countries, and in some jurisdictions private plaintiffs have brought suit as well (in actions that include at least one of the petitioners as a party). *See supra* pp. 3–4. Nor does it help petitioners that some nations' laws do not provide private damages remedies or that trebled damages are not available outside U.S. law. Cf. Pet. 21 n.6. It is precisely because other nations have adopted different policies regarding the regulation of competition, in particular different damages remedies, that the application of U.S. law would offend international comity. See *Empagran*, 542 U.S. at 169 (Pet. App. 39a) ("[I]f America's antitrust policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat."). The "harm done to, and the unlawful profits gained from, overseas consumers" (Pet. 19) are not proper considerations of U.S. law when those harms arise from the effects of anticompetitive conduct on foreign markets. They are matters to be addressed under the laws of the jurisdictions where those overseas consumers were injured.

Nor is it persuasive for petitioners to argue that, if they are unable to sue, "harm to * * * U.S. indirect purchasers who buy from them would go unremedied." Pet. 20. In *Empagran*, this Court held that the Sherman Act does not apply to claims based on foreign injuries that do not arise from a U.S. effect. Neither *Empagran* nor the FTAIA permits any exception to this rule based on the mere presence of U.S. indirect or downstream purchasers. Such an exception would impermissibly "swallow" a fundamental jurisdictional limitation

whole, something this Court warned against in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 702–03 (2004). See also *id.* at 758–60 (Ginsburg, J., concurring). More generally, Congress has already determined that indirect effects of foreign anticompetitive conduct on the United States fall outside the scope of U.S. antitrust concern. The FTAIA expressly limits the Sherman Act's extraterritorial reach to foreign conduct that has a "*direct*, substantial, and reasonably foreseeable" effect on U.S. commerce. 15 U.S.C. § 6a(1) (emphasis added).[9]

Faced with essentially the same arguments in *Empagran*, this Court explained that it was unable to weigh the competing policy considerations, which turned on questions of empirical fact. It also deemed them largely beside the point. Whatever the merits of the policy debate, the Court explained, the paramount considerations for purposes of construing the FTAIA are principles of prescriptive comity and Congress' intent "to clarify, perhaps to limit, but not *to expand*" the extraterritorial reach of the Sherman Act:

> "We cannot say whether, on balance, [petitioners'] side of this empirically based argument or the enforcement agencies' side is correct. But we can say that the answer to the dispute is neither clear enough, nor of such likely empirical significance, that it could overcome the considerations we have previously discussed and change our conclusion." 542 U.S. at 174–75 (Pet. App. 44a–45a).

None of the policy arguments advanced by petitioners supports a different view here. The court of appeals correctly determined that the considerations of comity and congres-

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[9] Petitioners' argument that they should be entitled to assert Sherman Act claims in order to vindicate harms to U.S. export commerce (Pet. 20) is incompatible with the FTAIA's express limitation of claims based on effects on U.S. export commerce to claims of injury by U.S. exporters. 15 U.S.C. § 6a(1)(B).

sional intent that guided this Court's decision in *Empagran* dictated the conclusion that petitioners' injuries lack the causal connection to the United States that is necessary for the Sherman Act to apply.

Finally, there is no merit to petitioners' alarmist claims about the scope of the ruling below. The court below appropriately applied the FTAIA, informed by important comity considerations emphasized by this Court and antitrust precedent, to limit claims based on foreign injuries to cases where those injuries arise directly from an effect on U.S. commerce.

III. HAVING CONCEDED THAT FOREIGN INJURIES ARE ACTIONABLE ONLY IF THEY WERE PROXIMATELY CAUSED BY AN EFFECT ON U.S. COMMERCE, PETITIONERS CANNOT NOW ASSERT THAT "BUT FOR" CAUSATION SUFFICES

This Court remanded this case to the D.C. Circuit to consider petitioners' alternative jurisdictional theory that their "worldwide market" allegations satisfied the FTAIA's requirement that a U.S. effect "give[] rise to" their claims. 542 U.S. at 175 (Pet. App. 45a). As the Court noted, this theory posits that "higher prices in the United States" were a "'but for' condition" of petitioners' foreign harm. *Id.* (Pet. App. 45a). The question for the court of appeals on remand was accordingly whether such a "but for" condition satisfied the FTAIA.

In the court of appeals, however, all parties and the circuit court agreed that the FTAIA requires that a U.S. effect was the proximate cause of a foreign injury. See *supra* p. 7 & n.1. And the court of appeals quite sensibly ruled that (as this Court had previously indicated) petitioners' allegations described only a "but for" connection to U.S. effects and thus could not satisfy that standard. Nor could the circuit court possibly have concluded otherwise, given the international

comity concerns that this Court recognized in *Empagran*. How could foreign nations possibly control competition policy in their own countries if participants in transactions in those countries could invoke U.S. antitrust law simply by alleging that a cartel's U.S. effects were necessary to avoid international arbitrage in the affected product?

Petitioners' concession on the issue that the court of appeals was asked to decide weighs heavily against review. As a result of that litigation choice, petitioners cannot now argue that the FTAIA is satisfied by a showing of "but for" causation. This limitation makes this case a poor vehicle for review. Even if the Court thought it worthwhile to consider whether "but for" or proximate causation is the standard under the FTAIA, it should not do so in this case, where that question is foreclosed.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

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November 28, 2005

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No. 05-541

IN THE

Supreme Court of the United States

Empagran, S.A. et al.,
Petitioners,

v.

F. Hoffmann-LaRoche Ltd. et al.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

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December 16, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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Cases

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REPLY BRIEF FOR THE PETITIONERS

This Court previously deferred ruling on the most important issue presented by this case: whether the Sherman Act applies to claims by victims of international cartels based on the cartel's conduct in this country when those victims made purchases from the cartel overseas. Because the D.C. Circuit had not addressed that question, this Court left it to be considered on remand in the first instance. The issue having now been decided, certiorari should be granted to provide needed certainty and clarity on an issue that is of unquestioned importance to the application of the antitrust laws in an era of rapidly expanding international trade.

The respondents' arguments, if anything, reinforce the importance of the case and, as a consequence, the basis for review in this Court. Respondents emphasize at length that the Federal Trade Commission and certain foreign governments participated as *amici* on remand, thereby demonstrating the recognition by those governmental officials that this is a case of unique importance to the international antitrust community. By the same token, numerous international antitrust and international law experts have filed as *amici* supporting petitioners in the case. See Pet. 15 n.5, 17, 20.

Nor do respondents dispute either that this Court could review the question with unusual efficiency or that its decision would provide considerably greater clarity than the D.C. Circuit's single, unelaborated paragraph of discussion. The Court has received full briefing on the issue once already. Were it not for the general practice of permitting a court of appeals to consider issues in the first instance, the question presented no doubt would have been finally resolved when the case was last in this Court.

Respondents' arguments for nonetheless denying certiorari lack merit. Respondents seize on this Court's use of the phrase "but for" in its prior opinion (Pet. App. 45a) to falsely assert that petitioners, while having agreed below that "proximate cause" is necessary, now argue only that "but for" cau-

sation is required. BIO 2, 3, 10, 26-27. This argument misconstrues this Court's opinion and misrepresents petitioners' position. Petitioners did not previously argue in this Court that "but for" causation was all the Sherman Act required – which is why respondents cannot point to anything in petitioners' briefing or oral argument to that effect – and this Court simply used that term as loose shorthand. Petitioners' position has always been that proximate cause is required and that proximate cause has been demonstrated in this case. In fact, respondents do not even seriously embrace their own argument, as they spend pages attempting to respond to petitioners' argument that "their injuries [were] the proximate result of the cartel's U.S. effects." BIO 16; see *id.* 16-19.[1]

Indeed, respondents' brief – like the court of appeals' decision it defends – elides the essence of the question presented: *what is* proximate cause in the context of a cartel suit, and why don't these petitioners' allegations qualify? Petitioners' suit is directed at conduct in this country: both respondents' price fixing and their market allocation agreements. Petitioners furthermore allege – and the cartel's structure confirms – that respondents *intended* their conduct in this country to injure purchasers abroad, and moreover that the cartel otherwise would have collapsed in the United States and elsewhere.[2]

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[1] Respondents' throwaway assertion that the D.C. Circuit made a "case-specific determination" about whether petitioners could state a claim (BIO 9) is both unexplained and inexplicable. The court of appeals unquestionably adopted a categorical rule applicable to cartel claims. Pet. App. 7a-8a.

[2] Petitioners' position is not that "an action intended to lead to a particular result" is, of itself, "necessarily the proximate cause of that result." Contra BIO 17. Rather, as the cases respondents cite recognize, the defendant's intent to cause an injury is certainly a relevant component of the proximate cause inquiry. That was the conclusion of this Court in *Associated General Contractors* in language respondents omit: "We are also satisfied that an allegation

Respondents' principal answer is that their conduct in this country cannot be deemed the proximate cause of petitioners' injury because the price increases overseas were a *more* direct cause. The closest they ever come to offering a definition of proximate cause is thus their assertion that "it was the alleged effect of price fixing on Australia, Ecuador, Panama and Ukraine, not on the United States, that directly and primarily caused the injuries petitioners sustained." BIO 16. But respondents cite no authority for this "directly and primarily" standard, no doubt because it rests on a fallacy: the fact that overseas price-fixing was a proximate cause does not negate the conclusion that the cartel activity in this country that is the subject of this suit is *also* a proximate cause. To the contrary, it is commonplace for injuries to have "multiple proximate causes." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 704 (2004). "Proximate cause is causation substantial enough and close enough to the harm to be recognized by law, but a given proximate cause need not be, and *frequently is not*, the exclusive proximate cause of harm." *Ibid.* (emphasis added). It might be a different matter if the higher prices petitioners paid overseas were the consequence of unrelated conduct by a third party. Such an independent, intervening event could conceivably be regarded as the exclusive "proximate cause" of the harm. But this case of course is entirely

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of improper motive, although it may support a plaintiff's damages claim under § 4 [of the Clayton Act], is not a panacea that will enable any complaint to withstand a motion to dismiss." *Associated Gen. Contractors* v. *California State Council of Carpenters*, 459 U.S. 519, 537 (1983). The courts of appeals decisions cited by respondents hold, as did *Associated General Contractors*, that intent is not a substitute for a finding that the plaintiffs were injured directly by the defendant's conduct. BIO 18 n.5. In this case, however, it is undisputed that petitioners are direct purchasers.

different – the higher prices overseas were imposed *by respondents* pursuant to the *same cartel agreement*.[3]

There is every reason to believe that petitioners' claims are "close enough to the harm to be recognized by law." *Sosa*, *supra*. The petition demonstrated – and respondents notably do not dispute – that Congress enacted the Sherman Act specifically to target cartels. Moreover, cartel claims like those brought by petitioners here are essential to fulfilling the purpose of the Sherman Act: protecting American consumers. Thus, respondents will net approximately *$10 billion in profits* if the judgment below is not reversed, despite having been caught red-handed. That is a recipe for non-deterrence. Few cartels will be deterred from inflicting billions of dollars of illegal costs on U.S. consumers when doing so permits the cartel to secure many billions more from abroad, if all the defendants risk if caught is the loss of their U.S. profits.[4] Re-

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[3] Respondents' contrary position that only the most direct cause of injury is actionable under the antitrust laws would also eviscerate the long-settled "effects doctrine," which this Court previously reaffirmed in this case, and under which overseas conduct is subject to Sherman Act liability for injuries that result from particular sales transactions in this country. See Pet. App. 35a. On respondents' view, the overseas anticompetitive conduct targeted by the effects doctrine is not the "proximate cause" of injury suffered in this country through higher prices paid here, and hence is not illegal.

[4] We recognize that the Department of Justice has suggested that damages may discourage participation in the government's amnesty program. Congress recently addressed this concern through legislation, however, by providing that amnesty participants will not be subject to treble damages. See Scott D. Hammond, Deputy Ass't A.G., "An Update of the Antitrust Division's Criminal Enforcement Program," available at www.usdoj.gov/atr/public/speeches/213247.htm (Nov. 16, 2005) (Antitrust Criminal Penalty Enhancement and Reform Act "enhances the incentive for corporations to self report illegal conduct by limiting the damages recoverable from an applicant to the Divi-

spondents accordingly have no answer to a basic question: How can it possibly be that Congress would have intended to preclude cartel claims while permitting the claims that respondents identify as demonstrating "proximate cause," none of which further the interests of U.S. consumers in any serious respect? See BIO 20-22.

Importantly, petitioners do not rely on a "chain-of-effects theory of causation." Contra BIO 17. In the case respondents cite, the plaintiffs sought recovery as indirect purchasers. *Ibid.* (citing *Associated Gen. Contractors*). But even the D.C. Circuit recognizes that petitioners are direct enforcers of the antitrust laws. See Pet. 13 (quoting Pet. App. 81a-82a). There is *no party*, for example, that was more directly injured by respondents' market-allocation agreement not to export vitamins from the United States to other markets. The other possible plaintiffs are themselves members of the conspiracy. See *id.* 19.

Respondents' related argument that the Sherman Act was not intended to protect overseas consumers simply rests on another fallacy, one that this Court expressly identified in *Pfizer* v. *Government of India*, in reasoning that is expressly embraced by the Conference Report on the FTAIA:

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sion's Corporate Leniency Program, that also cooperate with private plaintiffs in their damage actions against remaining cartel members, to the damages actually inflicted by the amnesty applicant's conduct."). The government's broader argument – that each dollar of civil liability reduces deterrence by discouraging amnesty participation – is grossly overbroad, as it is equally an argument against both (a) civil liability in domestic antitrust cases, and (b) the new foreign liability schemes that have been adopted by some countries and that respondents and the government embrace as valuable deterrents. In any event, this argument indisputably has no bearing on the statutory construction question before this Court, as the Department of Justice created the relevant amnesty program well after Congress enacted the FTAIA.

> The fact that Congress' foremost concern in passing the antitrust laws was the protection of Americans does not mean that it intended to deny foreigners a remedy when they are injured by antitrust violations. Treble-damages suits by foreigners who have been victimized by antitrust violations clearly may contribute to the protection of American consumers.

434 U.S. 308, 314 (1978); H.R. Rep. 97-686, at 10.

To the extent that this Court's prior opinion in this case sheds light on the question now presented, it supports petitioners' reading of the antitrust laws. Respondents fail to understand the significance of their recognition that this Court's prior decision "concluded that applying U.S. antitrust law to *foreign conduct* would be unreasonable when the plaintiffs' injuries were not caused by the effect of such conduct on U.S. commerce." BIO 5 (emphasis added). The Court's prior decision necessarily was directed at "foreign conduct" because there was – on the narrow factual premise of the opinion – no link between the defendants' "domestic conduct" and the plaintiffs' injuries overseas. Now, by contrast, the case is focused on the circumstances in which U.S. interests are at their apex – *viz.*, when the plaintiffs' injuries arise from the effect of defendants' conduct in this country, effects that impose serious injuries on American consumers in order to make possible further cartel profits abroad. Thus, this is not a case in which plaintiffs complain about price-fixing in a foreign country that has effects only upon foreign consumers and businesses. The factual premise of petitioners' present claim – a premise that respondents do not in this Court deny – is that respondents were able to extract cartel prices here and abroad only if they maintained cartel prices and market-allocation agreements in the United States. In this context, in which U.S. markets are manipulated and U.S. consumers are injured as a means of securing cartel profits worldwide, the sovereign interests of the United States are overwhelming.

Respondents' remaining argument is that applying the Sherman Act in this targeted context is an affront to comity. But as the petition for certiorari demonstrated, that is incorrect as a matter of settled international law: petitioners' claims arise from conduct in this country, and there is no conflict in the various affected nations' substantive law, all of which forbid cartel activity. It is settled that U.S. law properly applies in this circumstance. Indeed, the basis for the assertion of U.S. jurisdiction is stronger in this circumstance than in cases arising under the effects test, for in the latter cases, the proscribed conduct does not even occur in this country. See generally Pet. 24 & n.7.

But in any event, respondents' argument is entirely overbroad. The petition demonstrated – and again respondents do not deny – that respondents' foreign governmental *amici* represent the minority of jurisdictions with developed antitrust regimes. See Pet. 20-21 & n.6; Oral Arg. Trans., No. 03-724, *F. Hoffmann-LaRoche* v. *Empagran* 13-14 (QUESTION: "But surely there – there are other partners who have not been heard from. * * * * These are nations with – with fairly effective antitrust laws and antitrust enforcement. * * * * What about the majority of nations that don't have effective antitrust enforcement, if indeed they have any antitrust laws?"). There is a consensus among domestic and international authorities that existing remedial schemes simply do not sufficiently deter cartels, *ibid.* – a conclusion that is borne out by the immense profits that respondents seek to retain from their illegal conduct in this case. There may be an argument that the claims of plaintiffs who reside in countries with functioning antitrust regimes should be dismissed as a matter of comity. But that is an entirely different question from the one decided by the court of appeals on remand in this case. Respondents' argument does not require employing the sword of broadly sacrificing the interests of U.S. consumers when the concerns of its *amici* can be fully accommodated with the scalpel of a comity principle that permits a particular

subset of plaintiffs to pursue their claims abroad in the rare circumstance that such a forum is available.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

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December 16, 2005